United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1143

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P/S
B/S

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 76 - 1143

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

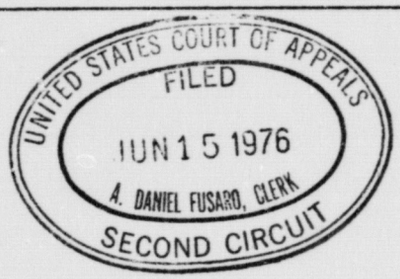
-against-

CHARLES D. ERB and FRANKLIN S. DE BOER,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT CHARLES D. ERB



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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 76 - 1143

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

CHARLES D. ERB,

Defendant-Appellant.

BRIEF FOR APPELLANT CHARLES D. ERB

Preliminary Statement

Charles D. Erb appeals from a Judgment of Conviction entered on March 11th, 1976, in the United States District Court for the Southern District of New York, following a ten-day trial before the Hon. Charles L. Brieant, United States District Judge and a jury.

Indictment No. 74 CR 818 (CLB), a sixteen-count indictment filed on August 19th, 1974, named appellant Erb and Franklin S. De Boer as defendants. Count One charged appellant Erb, De Boer and one George Van Aken, named only as a co-conspirator, with conspiring to falsely state, in registration statements filed with the Securities and Exchange Commission ("S.E.C."), in letters and in prospectuses, that their alleged nominees, and not the defendants themselves, were the owners of certain shares of X Print Corporation, a company which then was contemplating a public offering of its stock. Counts Two through Five charged the defendants with making such false statements in X Print registration statements and amendments thereto, filed in August through December, 1969. Counts Six through Eight charged De Boer with making false statements on the same subject in various letters to the S.E.C. in October and December, 1969, in violation of Title 18, United States Code, Section 1001. Counts Nine through Twelve charged both defendants with causing letters to be mailed on the same subject, pursuant to an alleged scheme to defraud, in violation of Title 18, United States Code, Section 1341. Counts Thirteen through Sixteen charged both defendants with causing the trans-

mission of prospectuses containing false statements on the same subject in December, 1969, in violation of Title 15, United States Code, Sections 77e(b) and 77j.

Trial commenced on May 21st, 1975. At the end of the Government's direct case, the Court dismissed the conspiracy count for failure to prove a single conspiracy to accomplish the alleged objectives (Tr. 783-786)*, and dismissed Counts Nine and Eleven, two of the mail fraud counts, for lack of proof of use of the mails (Tr. 768-9).

On June 2nd, 1975, the jury returned a verdict of guilty with respect to appellant Erb on each of Counts Two through Five, Ten and Twelve through Sixteen. At the same time, the jury returned a verdict of guilty against De Boer on Count Two and not guilty on the other twelve Counts in which he was named.

On March 11th, 1976, the Trial Court sentenced appellant Erb to concurrent terms of eighteen months in prison on each of the counts on which he was convicted except Count

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*References preceded by "A" are to Appellants' Joint Appendix. References preceded by "Tr" are to the trial transcript. References preceded by "Gx" are to Government exhibits and by "Dx" are to appellant Erb's exhibits.

Ten, on which execution of sentence was suspended and he was placed on probation for a term of thirty-one months to commence on his release from prison. At the same time, the Court sentenced De Boer to a term of five months in prison and a fine of $5,000 with thirty-one months of probation to follow his release.

STATEMENT OF THE FACTS

The Government's Case

Appellant Charles Erb, a partner in a New York brokerage firm, was convicted of causing false statements to be made during 1969 in documents filed with the S.E.C., in prospectuses, and in letters, to the effect that a man named Scott Skillern, and not appellant himself, was the owner of 30,000 shares of the common stock of an entirely legitimate corporation called X Print, which appellant's firm was in the process of taking public. As it turned out, none of X Print's stock was ever sold to the public, but there was no suggestion at trial that any investor would have relied on any misrepresentation as to Erb's ownership even if shares had been sold. No one made or lost a penny as a result of the misrepresentation

which Erb was alleged to have committed. There was no evidence that Erb, or indeed anyone else, was planning a manipulation or other misuse of X Print stock had the public offering gone forward.

The Government's principal witness below was a major stock swindler named George Van Aken. At the time of his testimony in this case, Van Aken had pleaded guilty to two counts of securities fraud in separate cases, for which he had not as yet been sentenced (Tr. 230-31).* On cross-examination, Van Aken conceded that he had "lied to", "cheated" and "defrauded" customers, brokers and mutual funds out of hundreds of thousands of dollars, and that he had received commercial bribes in excess of $100,000 in a series of stock swindles between 1970 and 1972 (Tr. 216-17). Van Aken admitted to having "no hesitancy about lying," and to have been lying "just about every working day from 1969-72" (Tr. 264). In March, 1973, after a lengthy investigation, the Government had proposed to Van Aken that if he pleaded guilty to certain of these offenses and testified as its witness, he would not be prosecuted for many other frauds or for tax evasion, no member of his family would

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*Van Aken was later sentenced to three years in prison.

be prosecuted, and he would have a "veto power" over what judge would sentence him. Van Aken made the deal (Tr. 218-23).

In early 1969, appellant Erb was working at the New York brokerage firm of Andresen & Company in capacities not involving the sale of securities. Van Aken, who had not yet begun his criminal career, was also at Andresen, as a registered representative. In February, 1969, Van Aken convinced appellant to become a partner with him at Baerwald & De Boer, another Wall Street brokerage firm of which Franklin De Boer was managing partner (Tr. 57-59; 173-74).

Shortly thereafter, Van Aken and appellant Erb met Earl Deimund, then the President of X Print Corporation, a firm engaged in the manufacture of color reproduction equipment (Tr. 60-61).* At a meeting in the early Spring of 1969 between Deimund, his attorney Paul De Coster, Conrad Schmitt, Van Aken and Erb, Deimund asked Van Aken and Erb if they would be interested in assisting X Print in a private placement of its

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*Unlike the typical securities fraud or "manipulation" case, there was no suggestion in this case that X Print was anything other than a legitimate company whose financial condition was exactly as represented in its prospectus.

stock (Tr. 62-3). Van Aken and Erb agreed to this, and also agreed to guarantee a bank loan to X Print (Tr. 63-64; 177). At the same meeting, Deimund agreed to make X Print stock available to Van Aken and Erb at "nominal sums" in return for their efforts (Tr. 63), and obtained an expression of willingness on the part of Van Aken and Erb to take X Print public at a later time (Tr. 63). Subsequently, Erb and Van Aken signed an agreement relating to the private placement of X Print's stock through Baerwald & De Boer (GX 101B' Tr. 64-5; 407-8); and, after that, an agreement to take X Print public (GX 102; Tr. 71-72; 408-09). The shares for Van Aken and Erb were subsequently issued, although the record is not clear as to how, when or for what payment (Tr. 69-70; 410-11).

Van Aken testified that on April 22nd, 1969, at Baerwald & De Boer, he describes X Print Corporation to De Boer in appellant's presence, told De Boer that X Print would be going public at $7.00 or $8.00 per share, and obtained from De Boer a check for $10,000 (GX 103), as payment for 5,000 shares at $2.00 per share (Tr. 72-74). According to Van Aken, De Boer then told him and appellant that, as partners in Baerwald & De Boer, they would all have

> ". . .problems with the Securities and Exchange Commission if we had the stock in our own name and the NASD, the National Association of Securities Dealers, because of the excess compensation by having the shares directly in our name and we were only allowed about 16 percent compensation and having low-priced stock would bring our compensation way up and it wouldn't be allowed by the SEC or the NASD" (Tr. 75).

Van Aken testified that shortly after this discussion with De Boer, Van Aken told appellant that he would be "using" Don Sedgwick as a "name for the stock" which he was to receive, and that appellant replied he would "probably use Dr. Scott Skillern" (Tr. 88). Van Aken said he further told appellant that he would let Sedgwick keep one-third of the stock put in his name, and appellant said he would probably do likewise (Tr. 89). The Government also offered evidence from which it argued, and the jury apparently found in convicting De Boer on Count Two, that the transferee of De Boer's shares, one James Lovelett, was simply De Boer's nominee (Tr. 317-70; 384-403).

Van Aken claimed that in May, 1969, at Baerwald & De Boer, he attended a meeting with Deimund, Deimund's attorney De Coster and Charles Erb, at which

> "Mr. De Coster said that after review he found out that Mr. Erb and myself would be

unable to have stock in our names directly because it would be a violation of the SEC and the NASD compensation laws. He said it would have to be changed.

I told Mr. De Coster that I was planning on substituting a name, probably Don Sedgwick, for my shares, and Mr. Erb told Mr. De Coster that he was going to substitute Scott Skillern for his name" (Tr. [illegible])

Earl Deimund testified to a different version of what the Government put forth as the same meeting. According to Deimund, a day or two after the meeting at which Van Aken and Erb agreed to handle the private placement, which he fixed as April 2nd, 1969,

"Mr. Van Aken came to me and said 'Hey, it will not be necessary for us to go to an outside brokerage house, Baerwald and De Boer will underwrite your public offering.'

When we discussed that with our attorney, Paul De Coster, it was then -- Paul made some calls to the SEC and to other places, to my knowledge, and it was determined that it would not be possible for Mr. Van Aken, Mr. Erb to own stock in [X Print] if Baerwald and DeBoer were to put out the public offering.

So we held a meeting in Mr. Schmitt's office and Mr. De Coster and myself told Mr. Schmitt and Mr. Van Aken, Mr. Erb, that the original concept of them owning stock would not be feasible and that if we were to do anything

with Baerwald and De Boer they could not own any of the stock themselves.

Q What if anything did Mr. Van Aken and Mr. Erb say about that?

MR. KOENIG: I object to the dual question.

THE COURT: Yes, sustained.

Q All right. What if anything did Mr. Van Aken say about that?"

* * *

"THE WITNESS: He said 'C'est la vie.' "

* * *

". . .He said in that case we will continue to underwrite -- continue to underwrite [X Print] and they would not own stock in [X Print].

Q Well, did he say anything about what they would do about the stock?"

* * *

"A I do not remember specific things that he said following that. We came to the agreement that a designee, a person to whom a strictly third party could be designated to purchase the stock. And that was the way that the designee of this stock came about" (Tr. 412-13).

Paul De Coster also testified to a meeting at which he explained that Van Aken and appellant's ownership of X Print stock would violate NASD excess compensation rules. According

to De Coster, the meeting took place at Schmitt's office on May 12th, 1969. De Coster testified that he, Deimund, Schmitt, Van Aken and Otto Knapp, an X Print Vice President, were present. As to appellant, De Coster said that "I believe Mr. Erb was present, although I cannot swear to that" (Tr. 545).

Subsequently, in mid-June, 1969, Van Aken and appellant Erb advised De Coster by telephone that they would designate Sedgwick and Skillern, respectively, as persons who would own the stock originally slated for them (Tr. 549-50).

Scott Skillern, a South Bend, Indiana dermatologist, testified that he met appellant in the late Summer of 1968 and thereafter opened a discretionary account at Baerwald & De Boer.* In April, 1969, according to Skillern, Erb described X Print to hi[illegible]ver the telephone and asked if Skillern

> ". . .would like to have 5,000 [sic] shares of letter investment stock of X Print with the gentlemanly understanding that you pay me $1,700 for 11,000 shares of that stock, that you would actually own, but the stock

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*When he opened the account, Skillern delivered into it about $290,000 worth of securities previously held by him in an account at Bache & Co. Those stocks were later sold and the proceeds re-invested in other securities on appellant's recommendation (Tr. 463-468).

would be in your name" (Tr. 470).

Skillern testified that he agreed and sent Erb a check for $1,700 (GX 301; Tr. 470-71).

Some time later, Baerwald & De Boer forwarded to Skillern a certificate in his name for 50,000 shares of X Print (DXY) and a form-type letter for him to send to X Print stating that he was purchasing as of June 10th, 1969, 50,000 shares for $2,500 (DXX). The letter bore a notation on the top in Erb's handwriting directing his secretary to send the letter to Skillern. Skillern signed the letter and returned it to X Print (Tr. 471-78). Skillern said he received, signed and forwarded the letter, but did not claim to have ever had any conversation with Erb about it (Tr. 477-78). Skillern first testified that the letter's reference to his ownership of 50,000 shares was accurate, and then changed his testimony to state that at the time he signed the letter, he was not "purchasing 50,000 shares of the stock for $2,500" (Tr. 475-77).*

Skillern went on to say that in October, 1969, he asked Erb if he could buy more X Print stock, and that they

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*Skillern also signed an "investment letter" with respect to the stock (Tr. 440).

agreed Skillern would buy 9,000 more shares for $2,000. Skillern then sent Erb a check for $2,000 and a letter stating that the check was being sent "on the purchase of 9,000 shares of X Print" (GX 302, 303; Tr. 478-79).

Skillern testified that in late 1969, with Erb's permission, he began recording telephone conversations with Erb "for a matter of record keeping", since "we were talking about such big money" (Tr. 487). The Government offered, and the Court received over Erb's objection, three tapes of telephone conversations on October 28th, November 22nd and December 11th, 1969 (Tr. 490-502-8). At several points on the tapes, Skillern made references to having 20,000 shares of X Print stock (GX 321, 323).*

Appellant's conviction on Counts Two through Five (false statements in X Print registration statement and

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*Large portions of the tapes played to the jury were entirely unrelated to the X Print transaction between appellant Erb and Skillern and dealt with other proposed securities transactions in a way which the Government characterized in summation as demonstrating a motive on the part of Skillern and appellant to evade taxes (Tr. 907). A principal point on this appeal is our contention that the receipt in evidence of these portions, which had no relevance whatsoever to the issues on trial in this case, was so prejudicial as to deny Erb a fair trial (See Point I, infra, pp. 22-31).

amendments) and Thirteen through Sixteen (false statements in X Print Prospectus), rested on (1) the fact that he was a partner in Baerwald & De Boer when these documents were submitted; (2) the fact that the documents reflected no shares going to him or Van Aken as underwriters' "compensation"; (3) the fact that Part II of the registration statement listed Skillern as having bought 50,000 shares of X Print for $2,500 on April 30th, 1969 and listed Lovelett and Sedgwick also as buyers; and (4) the fact that the Prospectus listed Lovelett as a selling stockholder (GX 2-5).

Van Aken also testified that in September, 1969, he received two letters from Robert Fischer. Government Exhibit No. 107, dated September 2nd, 1969, requested information which the NASD had sought from Fischer about, inter alia, the relationship of Skillern, Lovelett and Sedgwick to X Print. Van Aken said he had made no response to that letter (Tr. 122-23).

Government Exhibit No. 108, a letter from Baerwald & De Boer's lawyer Fischer to Van Aken dated September 26th, 1969, enclosed a September 24th letter to Fischer from Paul De Coster stating that the relationship of Sedgwick, Skillern and Lovelett to X Print was that of "investor" (GX 9). In his September 26th letter, Fischer asked Van Aken "to confirm to

me in writing as to whether or not [the De Coster letter of September 24th, 1969] contains an accurate reply to my inquiry of September 2nd concerning additional information which the National Association of Securities Dealers requires" (GX 108). Van Aken testified that upon receiving GX 108, he told appellant he "didn't want to sign that document because it contained false information." According to Van Aken, appellant said that he would "take care of it" (Tr. 124-5).

The Government then offered a letter dated October 1st, 1969 from appellant Erb to Fischer stating:

> "Dear Bob:
>
> Reference your letter of September 26th, 1969, this letter represents an accurate reply to your letter of September 2nd, 1969, per George Van Aken.
>
> If you have any questions, please call me. (GX 108A)

Next, the Government offered De Coster's testimony that on October 9th, 1969, De Coster wrote a letter to Fischer stating information De Coster got from appellant to the effect that Skillern was a "medical doctor practicing in South Bend, Indiana," and Lovelett a "private investor residing in Southport, Connecticut" (GX 11; Tr. 553-54). De Coster's letters to Fischer of September 24th and October 9th were mailed out by Fischer

to the NASD (GX 10, 12; Tr. 584-588). Although the information in the letters was, at least as to Skillern, true, these mailings by Fischer to the NASD formed the basis for appellant Erb's conviction on mail fraud Counts Nine and Ten, on the theory that appellant's October 1st letter confirming the accuracy of De Coster's September 24th letter, and appellant's supplying of information to De Coster for the October 9th letter, "caused" the mailings by Fischer to the NASD. While this may have technically been accurate, and there is concededly no requirement that a letter mailed in furtherance of a scheme to defraud itself tell lies, these counts give some indication of the lengths to which the Government went in this case to prosecute appellant's conduct as a series of felonies.*

To support its consistently maintained theory that

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*The Government offered the following additional evidence designed to show appellant's criminality: (1) that he had once put Skillern up to writing a letter about him which falsely stated that they had known each other for three years (Tr. 502-42-43); (2) that at appellant's suggestion, Skillern paid $100 a month towards Van Aken's Manhattan apartment to "establish a residence in New York" and "avoid the Blue Sky Law" (Tr. 460-61; 167-68); and (3) that in the Fall of 1969, appellant wrote a letter to an Indiana banker for Skillern saying that Skillern was the owner of 50,000 X Print shares (Tr. 502-43-57).

appellants had a motive to place their stock in nominee names to evade the NASD's excess compensation rules, the Government called a Vice President of NASD, George Warner, to explain the NASD's byzantine rules relating to excess compensation. Assuming in his testimony that appellants and Van Aken owned the shares in question, Mr. Warner stated that under NASD rules, all of the shares were to be considered as compensation to underwriters (including, for example, the 20,000 shares which even the Government conceded were sold at very low cost to Skillern) and that, despite the investment letters under which they were taken in each case, all of the shares were to be valued at the proposed $7.50 public offering price. Mr. Warner concluded that the "compensation" received substantially exceeded that allowable under NASD rules (Tr. 641-70).

The X Print registration statement became effective on December 22nd, 1969 (Tr. 146). In January, 1970, however, appellant himself cancelled the public offering (Tr. 148).* Earl Deimund, X Print's President, explained what happened as follows:

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*By this time, appellant had become Baerwald's & De Boer's managing partner (Tr. 211).

"I was told by people at Baerwald -- I believe it was George Van Aken, but it could well have been by Mr. Erb -- toward the end of December that the underwriting was sold out and then it became unsold and then it decreased in size from sold underwriting that included stock for the selling shareholders down to just the stock that was being offered by the company. The agreement was for 100,000 shares of stock for the company for some 22,500 shares of stock for the selling shareholders, with an option for another, I believe it was 12,000 shares of stock for the company. They had a right for an extra 10 per cent or 12 per cent overage.

And conversations held during that month started out that all 135,00 shares of stock. . ."

* * *

"That all the shares of stock were sold in December and they sort of became unsold and of course after around the first few days in January George Van Aken disappeared from the -- from my contacts with Baerwald and De Boer and subsequent to that they would have been with Mr. Erb and I believe about the last conversation we had was around the 15th of January, at which time I was notified that the selling shareholder's stock, was not sold, but that 100,000 shares of stock had been sold and the stockholders' names would be given to the bank the next day, which would have been the 16th of January . . ."

* * *

"And we were to pick up the checks for $750,000 but when we arrived in the morning I was handed

> a telegram from the SEC -- I believe it was from the SEC -- that directed Baerwald and De Boer to return the monies received for XPrint Corporation back to the public. And I got no other explanation than that. . ."
>
> * * *
>
> "I believe [appellant Erb] said that George Van Aken had left the firm and in the process of doing that certain firm monies were due a third party who I never heard the name of and that it was necessary over the weekend of the 17th and 18th of January to pay off an amount of money like $300,000. And that was by putting a stop order in on a check that Baerwald and De Boer had put into the bank on the 16th
>
> And when that money was removed from our trust account, the only other portion that they had, he had, whoever he is, Baerwald & DeBoer or Erb, was to notify the SEC that they had not completed the underwriting" (Tr. 424-29).

Thus, the entire public offering was cancelled and the funds paid in by all prospective purchasers were returned.

The Defense

Appellant offered no evidence. In summation, his trial counsel argued to the jury that the testimony of Van Aken and Skillern was incredible, and that Skillern's June, 1959 letter to X Print stating that he had bought 50,000 shares for $2,500 (DXX) was the truth, confirmed by the fact that when

the offering was cancelled, the company sent him its note for $2,500 (Tr. 502-33).*

The Sentence

Appellant, a graduate of West Point and Colonel in the Army Reserve, had an exemplary background, which included teaching at Fairleigh Dickinson and Rutgers Universities. Married for many years and with three children, appellant's net worth at the time of sentence was virtually nothing. He had candidly assisted the Government in the single area in which it had sought his cooperation.

Indicating that it was relying only on the trial record before it, and that it saw no need for appellant to be

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*In an affidavit submitted on appellant Erb's new trial motion, Skillern stated that by December, 1969 he considered himself the owner of all 50,000 X Print shares, but that it would have been reasonable for appellant Erb to have concluded that he, himself, had no further interest in any of the shares much earlier in the Fall of 1969 as a result of demands on him by Skillern to use the shares in collateralizing a loan, Skillern's subsequent use of the shares for that purpose, and the benefit conferred on Erb in October, 1969 by Skillern's agreement to subordinate his trading account at Baerwald & De Boer to the firm. Although Skillern gave, at the same time, an affidavit denying that he was recanting his trial testimony in any way, these were obviously facts which should have been brought before the trial jury by appellant's trial counsel.

rehabilitated, the Court stated that it had "a duty to deal with these matters without regard to any feeling that the Court must have for people whose lives are otherwise blameless." The Court then sentenced appellant to eighteen months in jail (Sentencing Minutes, pp. 1-22).

QUESTIONS PRESENTED

1. Whether the following occurrences at trial, separately or in combination, require a new trial:

a. The receipt in evidence of tape recorded telephone conversations between Government witness Scott Skillern and appellant Erb in the Fall of 1969, which are subject to the interpretation that, in discussing possible future stock transactions completely separate from the 50,000 share X Print transaction involved in this case, Skillern and Erb were contemplating violations of the tax laws;

b. The prosecutor's accusation, made for the first time in his summation, that in these conversations Skillern and appellant were trying to cheat on taxes; and

c. The failure of the prosecutor to elicit from Skillern or to disclose to the Court or counsel Skillern's pre-trial explanation to the prosecutor that the conversations

in question did not contemplate any tax violations whatsoever?

2. Whether the Trial Court erred in refusing to permit appellant Erb to show at a post-trial hearing in his motion for a new trial that the prosecution had deliberately withheld information which was material and favorable to the defense on the question whether appellant had attended an important meeting at which NASD rules forbidding excess compensation to underwriters were discussed?

3. Whether the Trial Court committed reversible error in charging that Donald Sedgwick was a "cumulative" witness, from whose absence no adverse inferences could be drawn, when in fact Sedgwick would have flatly denied that he was Van Aken's nominee?

ARGUMENT

POINT I

Appellant was denied a fair trial by the receipt in evidence of his tape recorded conversations on irrelevant and prejudicial subjects, by the prosecutor's accusation in his summation that appellant was trying in these conversations to "cheat on taxes", and by the prosecutor's deliberate withholding of the fact that the other party to these conversations had vigorously denied their criminality.

Over objection by appellant's counsel, the Trial Court received in evidence three tape recorded telephone conversations between appellant Erb and Government witness Scott

Skillern in late 1969, including some highly cryptic exchanges on the subject of possible future stock transactions which lent themselves to an interpretation that Skillern and appellant had in mind future tax violations. Since these portions of the taped conversations related in no way whatsoever to the 50,00 share X Print transaction which was at issue in this trial, the receipt in evidence of the entire tapes was obviously wrong. The error was compounded when, for the first time in summation, the prosecutor accused appellant and Skillern of trying to "cheat on taxes." To make matters worse, the prosecutor knew when he made this charge, but never disclosed to Court or counsel, that Skillern had, in pre-trial interviews about the tapes, flatly denied to him that he and appellant had been contemplating any tax violations whatsoever. These errors unfairly injected into this trial an extraordinarily inflammatory and irrelevant issue to which the defense had no opportunity for response. Even considered separately, let alone in combination, these errors require a new trial.

The Government's case against appellant rested heavily on the testimony of George Van Aken and Scott Skillern, the credibility of both of whom was obviously highly

questionable.* On its direct case, seeking to corroborate them, the Government chose to offer tapes of telephone conversations which took place between Skillern and appellant on October 28th, November 22nd and December 11th, 1969. Although "not too happy about the tapes" (Tr. 502-8), the Court allowed the Government to play them. The tapes concededly contained several references by Dr. Skillern to 20,000 shares of X Print (see transcript of October 28th tape, p.2; November 22nd tape, p.3; and December 11th tape, p.5),* which in the absence of replies by appellant that Skillern actually owned 50,000 shares, supported the Government's theory that appellant believed Dr. Skillern only owned 20,000 shares of the 50,000 X Print shares at the time of the calls. But these references could certainly have been played to the jury by themselves, since whatever support they gave to the Government's theory was in no way dependent upon the surrounding conversation. Nevertheless, the Government was allowed to play the entire conversations (with

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*Indeed, the prosecutor, characterizing the quality of his proof at mid-trial, told the Court that Skillern's "credibility is perhaps the worst of anyone yet to appear" (Tr. 502-51).

*See A-31.

one exception not here relevant), including a series of very confusing exchanges obviously relating in some way to the tax consequences of some possible future stock transactions which Skillern and appellant were discussing.

The Trial Court's decision to receive the entire tapes in evidence was based, we respectfully submit, on a fundamental misreading of the tapes. Thus, in response to appellant's trial counsel's correct statement that "there is a tremendous amount of conversation in these tapes which does not relate to the current case" (Tr. 495), the Court replied:

> "I would narrow the amount of the tape being played to limit it to X Print and to this witness' motivation or this witness' situation with respect to his Federal income tax if I could find a practical means for doing that. But I think that we have the problem of the rule of completeness here and a single conversation which has a substantial content concerning X Print and a substantial content concerning his tax picture, which is highly relevant here, then I think I would have to take the entire conversation of that day" (Tr. 495).

The Court's supposition that the discussions about taxes related in any way to the 50,000 shares of X Print at issue in this case was simply wrong. However difficult it may be to decipher what appellant and Skillern were discussing, it is at least clear from a reading of the tapes that their talk,

insofar as it involved tax considerations, related only to possible future stock transactions.* Thus, the playing to the jury of all the talk about taxes was utterly irrelevant to the X Print transaction involved in this case, and represented a classic example of inadmissible proof of other crimes. See, e.g. United States v. Chestnut, --- F.2d --- [2nd Cir., March 8th, 1976], sl.op. at 2454-55; United States v. Papadakis, 510 F.2d 287, 294-95 [2nd Cir., 1975], both affirming but stating the rule in detail; Federal Rules of Evidence, Rule 404[b].

The Government did not ask a single question of Skillern about any of the contents of the tapes, let alone any question suggesting that Skillern and appellant had been contemplating tax evasion. Nevertheless, out of the blue in summation, the prosecutor announced to the jury that in their discussions, appellant and Skillern were "trying to cheat on taxes" (Tr. 907).

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*For example, the discussion at p.1ff of the November 22nd, 1969 tape about X Print shares and tax considerations obviously has nothing to do with the 50,000 shares involved in this case, but rather concerns the possibility that Skillern would receive some of the 25,000 X Print shares that Erb expected to have allocated to him for sale at the public offering.

The damage caused by this accusation was extreme. First, there was no opportunity for defense, since the Government had never even hinted at such a charge during the entire course of the trial. Second, although the Trial Court immediately sustained appellant's objections to the prosecutor's accusation (Tr. 907), the damage could hardly be undone. It seems obvious that in a case which charged a highly technical crime involving no dollar loss to anyone, and which depended so heavily on the testimony of witnesses whose rock-bottom credibility even the Government conceded, the tax evasion brand which the prosecution gratuitously put on the tapes must have had an extraordinary impact on the jury.

The Trial Court's treatment of the issue in its opinion on the new trial motion below does nothing to excuse the impact of these errors. Although, as noted above, the Trial Court sustained appellant's objection to the prosecution's accusation of tax fraud in his summation, the Court, in its post-trial opinion, appears to take the position that the accusation was fair comment on the appellant's motive to use Skillern as a nominee. The Court wrote:

> "It was, and remains, the Government's theory that Erb and Skillern were planning tax evasion

> by having transactions for Erb's benefit done in Skillern's name, as it was contended was done in the X Print transaction, so as to take advantage of Skillern's loss carry-over deductions" (A 86).

Most respectfully, this statement is utterly wrong. The prosecutor's one-liner about tax cheating in his summation was the only reference by the Government to a tax-evasion motive in the entire trial, including the long colloquy between Court and counsel which preceded the Court's decision to receive the tapes (Tr. 493-502-8). Except for this gratuitous remark, it was never the Government's theory that Erb had a tax evasion motive for using Skillern as a nominee. Rather, as explained at length in Point II, infra, the Government's consistently stated theory was that Erb had the motive of avoiding the NASD's excess compensation rules. Perhaps the Government could have properly proven such a tax evasion motive if it had any facts to support it. The point is that neither the tapes nor any other proof supplied such a motive. To repeat, the taped conversations about tax considerations related to proposed future stock transactions and not in any way to the X Print transaction on trial. That is why these portions of the tapes should never have been received and that is why the prosecutor's accusation

on summation was so grossly prejudicial an error.

Finally, these errors were made worse by that we submit was misconduct by the prosecutor in not disclosing to the Court and counsel that Skillern had flatly stated to him before the trial that he and appellant had not been contemplating violations of the tax laws in these conversations. In his summation, the prosecutor told the jury:

> "I guess that most of you sitting here listening to what went on on those tapes thought to yourself what in the name of heaven are those men talking about. I'd like to be able to stand here and explain it all to you ladies and gentlemen, but I don't think I'm going to even try. Because I have to confess that after reading what we thought were the best transcripts we were able to produce, and listening to the tapes many more times than you did, I don't feel any confidence in my ability to explain to you what those men were talking about other than in the most general terms" (Tr. 905).

That frank statement of the obvious was followed by the prosecutor's explicit charge that what Skillern and appellant were talking about was in fact an effort "to cheat on taxes" (Tr. 907). However, at the time that the prosecutor offered the tapes, he already knew, according to Skillern's affidavit on the new trial motion, which the prosecutor did not dispute in his post-trial affidavit, that Skillern flatly denied that

he and appellant were seeking in these conversations to evade taxes. Thus, according to Skillern's affidavit, in a pre-trial interview, the prosecutor accused Dr. Skillern of plotting tax evasion in the tapes, but was explicitly told by Skillern that he, and not appellant initiated discussions as to the tax consequences of proposed stock transactions, that Skillern did not believe his proposal was illegal and that the transactions never in any event took place (A 64-67).

Nevertheless, the prosecutor neither asked Skillern to explain anything on the tapes when they were offered (Tr. 486-90), nor ever disclosed to the Court or defense that Skillern himself denied the highly prejudicial interpretation which the prosecutor chose to give to the tapes in summation. We submit that the prosecutor's knowing failure to advise the Court or the defense of Skillern's flat denial of his own interpretation represented a violation of his duties under Brady v. Maryland, 373 U.S. 83 (1963).

In its opinion on the new trial motion below, the Trial Court dismissed appellant's Brady argument with the statement that "Proof that Skillern lacked the criminal intent to commit tax fraud did not prove that Erb lacked the criminal

intent to commit securities and mail fraud" (A 64). That is obviously so, but hardly relevant. Appellant's point was, and is, that the Government knew when it chose at the end of the trial to characterize the conversations as tax cheating that one of the parties to the conversation, its own witness, had flatly denied it. Skillern's denial of any fraud, had the defense known it, could have been used to blunt the effect of the prosecution's accusation. That information would obviously have been "material" and "favorable" to the defense, and thus the Government's deliberate withholding of it requires a new trial. United States v. Morell, --- F.2d --- (2nd Cir., August 29th, 1975), sl.op. at p.5873; United States v. Stofsky, et al., --- F.2d --- (2nd Cir., November 7th, 1975), sl.op. at p.524; United States v. Hilton, 521 F.2d 164, 166 (2nd Cir., 1975) (all discussed infra, Point II, at pp. 39-43).

POINT II

Appellant was improperly denied a hearing on his motion for a new trial.

After conviction, appellant moved for a new trial on the ground that the prosecutor had deliberately withheld facts which cast grave doubt on the Government's claim that appellant

had attended a key meeting between Van Aken, Deimund and De Coster on May 12th, 1969. The motion was denied without a hearing. Although obliged to accept the moving affidavits as true, the Trial Court simply ignored the fact that those affidavits plainly alleged a deliberate withholding of information material to the defense. Under established case law, proof of the facts alleged would have entitled appellant to a new trial, and thus the Trial Court's refusal to grant him a hearing was improper.

A. The Facts

The Government placed extraordinary weight at the trial (e.g., opening, pp. 13-14, 25 and summation, pp. 884, 886, 898, 901)* on the theory that the appellant's motive for causing the alleged mis-statements and omissions about their own ownership would have constituted violations of NASD excess compensation rules. Van Aken testified to discussions with

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*At the very beginning of the summation, the prosecutor told the jury that "the reason for this concealment" was to evade the NASD rules (Tr. 884).

appellant and De Boer on this subject, but his credibility was so suspect that of far greater importance was the testimony of Paul De Coster and Earl Deimund, two untainted witnesses. De Coster testified to a meeting on May 12th, 1969 at the offices of Conrad Schmitt at Kimberly Capital Corporation, U.N. Plaza, at which De Coster gave specific advice that ownership by Van Aken or appellant of X Print shares would violate the excess compensation rules. De Coster specifically identified Schmitt, Deimund, and Van Aken as being at the meeting, and testified to the May 12th daye from a diary entry (Tr. 545-46). As to appellant, De Coster said that "I believe that Mr. Erb was present, although I cannot swear to it" (Tr. 545),* causing the Court to give a cautionary instruction as to how the jury should view the question of appellant's presence (Tr. 550) and to comment at the side bar that

> "I'm a little perplexed by his testimony. All that any witness testifies to is his best recollection. So here is a fellow who is a lawyer and he has a best recollection but he cannot swear to it" (Tr. 552).

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*De Coster later amended his original answers to say that "My best recollection, Your Honor, is that he was present, but I cannot swear to it with a certainty that I have as to other people" (Tr. 546).

Deimund, obviously testifying about the same meeting in Schmitt's office, was never asked by the prosecution to state precisely who was at the meeting, and merely testified:

> "So we held a meeting in Mr. Schmitt's office and Mr. DeCoster and myself told Mr. Schmitt and Mr. Van Aken, Mr. Erb, that the original concept of them owning stock would not be feasible and that if we were to do anything with Baerwald and DeBoer they could not own any of the stock themselves.
>
> Q [By the prosecutor] What if anything did Mr. Van Aken and Mr. Erb say about that?
>
> MR. KOENIG: I object to the dual question.
>
> THE COURT: Yes, sustained.
>
> Q All right. What if anything did Mr. Van Aken say about that?
>
> A To the best of my recollection, Mr. Van Aken [said]. . .'C'est la vie' " (Tr. 412-13)

The prosecutor did not pursue with any separate question as to what appellant said. But later, in arguing to the Court as to how it should handle the equivocal testimony of De Coster on the same subject, Mr. Lowe made reference to Deimund, stating that he "also testified about this meeting and put Mr. Erb there" (Tr. 551).

Finally, in his summation, Mr. Lowe made the following

argument in response to appellant Erb's counsel's contention as to the paucity of credible evidence that appellant Erb was at this key meeting:

> "[Mr Koenig, appellant Erb's trial counsel,] also said that Mr. DeCoster couldn't be sure that Mr. Erb was there at that one meeting when they told him they could not own the stock. And that's what Mr. DeCoster told you, 'I think he was there, I believe he was there, but I am not quite certain of it.'
>
> And then Mr. Koenig would suggest to you that because Mr. DeCoster said that and because Mr. Van Aken said Erb was there, obviously Erb wasn't there. I suggest to you, ladies and gentlemen, that Mr. Koenig forgot something. He forgot Earl Deimund, who was there and who testified that Erb was there. Three people, ladies and gentlemen. Three people testified. Two were sure he was there and the other one, 'I'm pretty sure but I can't be positive he was there.' Sounds like he was there, contrary to the 'Obviously he wasn't there' " (Tr. 1012-13; emphasis added).

Appellant's new trial motion offered substantial evidence that appellant was not in fact at the meeting and, most important, that the prosecutor improperly permitted the jury to conclude that the issue was not in doubt, when he knew full well that it was:

(i) Earl Deimund submitted an affidavit stating that he had always believed it was unlikely ("30% probable")

that appellant was at the meeting and that he explicitly told first one Assistant United States Attorney and later Mr. Lowe of this strong reservation. He went on to swear:

> "Indeed, on the day I testified at the trial, Mr. Lowe again asked me whether I did not clearly recall that Mr. Erb was at the meeting and I again told him what I had previously said. Then once more in the Courthouse, just before I testified, Mr. Lowe asked the same question, and I gave the same answer" (A 74-75).

(ii) Conrad Schmitt gave an affidavit saying that appellant was never in his office at Kimberly Capital Corporation, that he never met with Erb about X Print, and that when questioned by the United States Attorney's office, he stated that he never met with Erb about X Print (A 75-76).

(iii) Appellant himself gave an affidavit swearing that he never discussed with Van Aken or De Boer any inhibition on buying X Print on account of excess compensation rules and further stating that he did not attend the meeting testified to at the trial and was, indeed, never in Schmitt's office (A 71-72).

(iv) Finally, appellant submitted his diary for 1969, which was in the possession of his accountant until after the trial, and which is blank for Friday, May 9th, 1969, and has

one cancelled meeting on May 12th (not with any X Print people) which was rescheduled for May 13th. Appellant further swore that he believed he was in California on May 9th - 12th, returning May 12th, and that he stayed in California with an acquaintance named Larry Gibbons, who also gave a corroborating affidavit.

The answering affidavit by Assistant United States Attorney Lowe denied that Deimund ever told him that he "believed it was only a thirty percent probability" that appellant was at the May meeting, and swore that "Mr. Deimund consistently placed Mr. Erb at the May meeting to the best of his recollection."* Frank Wohl, the other Assistant to whom Deimund had expressed reservation about appellant Erb's presence at the May meeting, submitted an affidavit expressing no recollection of ever discussing such a meeting with Deimund at all.

In its opinion, the Trial Court found that "under the circumstances here presented, the failure to disclose must

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*Although that broad assertion concededly covers the point, Mr. Lowe did not bother to address himself to Deimund's explicit assertion that twice on the very day he testified he repeated to Lowe his strong reservation as to whether appellant Erb was at the May meeting.

be viewed as inadvertent" (emphasis added). Concluding that there was no "significant chance that this added item . . . could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction," citing United States v. Rosner, 516 F.2d 269, 272 (2nd Cir., 1975), the Trial Court denied the motion without a hearing.

B. Argument

The Trial Court correctly ruled in its opinion that appellant could have himself testified at the trial that he was not at the May 12th meeting, could have produced his diary, and could have called Schmitt and Gibbons as witnesses. But the thrust of the motion was not newly discovered evidence; although the proof that appellant was not at the meeting, especially in light of the Government's equivocal evidence on the point, was strong, it was not "newly discovered." Rather, appellant's point was that the Government, in an effort to shore up Van Aken's credibility, had deliberately permitted Deimund's fleeting reference to Erb's attendance at the meeting to be accepted by the Court and jury when he knew that Deimund in fact had repeatedly told him that it was unlikely that

appellant was there at all.

Accepting Deimund's affidavit as true, his reservations about appellant's presence at the May 12th meeting had been clearly stated to the prosecutor in preparation for trial. Then on the very day Deimund testified, Mr. Lowe had twice again made a special point of raising the issue of appellant's presence at the May meeting and had twice been reminded of Deimund's strong reservations. It is inconceivable that only a few hours later the prosecutor could have forgotten his repeated probing and Deimund's repeated answers, such that his failure to tell the Court and counsel of Deimund's reservations could be called merely "inadvertent." The obvious, blunt fact is that if Deimund was telling the truth in his affidavit, the prosecutor had been deliberately trying to pass off Deimund's testimony on a key point as something which he knew it was not.

The decisions of this Court are crystal clear that "the intentional governmental suppression of evidence useful to the defense at trial will mandate a virtual automatic reversal of a criminal conviction." United States v. Stofsky, et al --- F.2d --- (2nd Cir., November 7th, 1975), sl.op. at p.524; United States v. Hilton, 521 F.2d 164, 166 (2nd Cir.,

1975). This Court's recent decision in United States v. Morell, --- F.2d --- (2nd Cir., August 29th, 1975), sl.op at p.5873, is squarely in point. There the issue was whether defendants convicted of serious narcotics offenses were entitled to a new trial because the Government had failed to make exculpatory evidentiary material in its possession available to the defense. While an appeal from the judgment of conviction was pending, the prosecution advised this Court and the defense that it had for the first time discovered the existence of a confidential file in the possession of the Drug Enforcement Administration relating to dealings and arrangements between narcotics agents and the prosecution's principal witness, an informant. The documentary material in the file bore directly on the informant's credibility and was likely to have bolstered the theory of the defense. This Court then remanded the case to the district court to make appropriate findings with respect to the new material which had come to light. The district court, without holding an evidentiary hearing as to the Government's culpability for its failure to disclose the material earlier or making any determination with respect thereto, denied defendant a new trial.

When the appeal again came before this Court, Judge Moore stated:

> "The standards governing the grant of a new trial [for failure to disclose evidence in the government's possession favorable to the defendant] vary according to the extent of the government's culpability. If the prosecutor has intentionally suppressed evidence or ignored evidence whose high value* to the defense could not have escaped his attention, a new trial is warranted if the evidence is merely material or favorable to the defense. E.g. United States v. Kahn, 472 F.2d 272, 287 (2nd Cir.), cert. denied, 411 U.S. 982 (1972); United States v. Keogh, 391 F.2d 138, 145-47 (2nd Cir., 1968). If, on the other hand, the government's failure to disclose is merely inadvertent or negligent, a new trial is required only if there is a 'significant chance that this added item, deveoped by skilled counsel as it would have been, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction.' United States v. Rosner, 515 F.2d 269, 273 (2nd Cir., 1975);

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*It is clear that the quoted words "high value" do not themselves fix a standard of materiality necessary for reversal in the case of deliberate suppression of evidence, but rather merely define those circumstances in which the ignoring of evidence can, because of its obvious significance, be considered deliberate. See, United States v. Hilton, 521 F.2d 164, 166 (2nd Cir., 1975) in which this Court stated:

> "If the government deliberately suppresses evidence or ignores evidence of such high value that it could not have escaped its attention, a new trial is warranted if the evidence is merely material or favorable to the defense." (Emphasis added)

United States v. Seijo, 514 F.2d 1357, 1364 (2nd Cir., 1975); Grant v. Alldredge, 498 F.2d 376, 380 (2nd Cir., 1974); United States v. Miller, 411 F.2d 825, 832 (2nd Cir., 1969), slip opinion at 5878-79."

After reviewing the material which the Government had failed to disclose, Judge Moore found there was not "a significant chance" that the undisclosed information would have affected the jury's verdict and, therefore, concluded that:

> "[I]f the district court finds that the failure to disclose this material was deliberate or the result of gross negligence on the part of the government, it should order a new trial. If, however, the failure was simply inadvertent or negligent, a new trial would not be required." Slip opinion at 5882.

The case was again remanded to the district court with directions to hold an evidentiary hearing and make appropriate findings as to the extent of the Government's culpability for its failure to disclose.* See, also, United States v. Hilton, 521 F.2d 164 (2nd Cir., 1975), where this Court also remanded for a hearing on the issue of the degree of culpability involved

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*The description in text above of Morell's issues and procedural history is taken verbatim from this Court's opinion in United States v. Miranda, December 3rd, 1975, slip opinion at 6554-55.

in the Government's failure to disclose a letter by a Government witness which bore on his credibility.

There can be no question in this case that disclosure by the prosecutor of Deimund's repeated statements that appellant probably was not at the May 12th meeting would have been, at the very least, "merely material or favorable to the defense." United States v. Morell, supra. The Government pressed strenuously the theory that the NASD's excess compensation rules gave appellant a reason to hide his ownership of the stock. But Van Aken was a confessed liar many times over, and so the corroboration which the testimony of Deimund and De Coster appeared to offer to Van Aken's claim that the appellant knew the NASD rules, was obviously significant testimony. Since De Coster himself was equivocal on the issue of Erb's presence at the May 12th meeting, the availability to the defense of the fact that Deimund had repeatedly expressed strong doubts to the Government on the same point would have plainly been both "material" and "favorable" to the defense.

Finally, we wish to stress the other allegations made in appellant's new trial motion concerning the May 12th meeting - Conrad Schmitt's affidavit swearing that he never met with appellant about X Print and that appellant was never in his

office (the place where the May 12th meeting was supposed to have taken place); appellant's affidavit swearing that he was not at the meeting and was in fact, to his best recollection, in California at the time; appellant's New York office diary, which was blank for May 9th and one cancelled meeting, not involving X Print, for May 12th; and the corroborating affidavit of a California acquaintance of appellant placing him in California at about that time. These items may not have been "newly discovered" within the meaning of the traditional new trial test. But they do, coupled with Deimund's affidavit and De Coster's equivocation, make it highly likely that appellant was not in fact at the meeting. Thus, the issue here is not simply whether appellant was deprived of a good tactical wedge by the Government's deliberate withholding of significant information concerning Deimund, but rather whether the Government's conduct prevented appellant from exploiting a significant point on which it appears very likely that Van Aken, the Government's principal witness, was in fact giving false testimony.

POINT III

The Trial Court erred in charging that Donald Sedgwick was a "cumulative" witness, from whose absence the jury could, therefore, draw no inference against the Government; that error was compounded when, advised that Sedgwick would in fact have flatly contradicted Van Aken and thus could not conceivably be regarded as "cumulative", the Court refused to correct its instruction.

Although Van Aken testified to his plan to use one Donald Sedgwick as his X Print nominee and Van Aken's shares were in fact transferred to Sedgwick's name (Tr. 90, 413-14), the Government did not call Sedgwick to show that he really was the nominee Van Aken said he was. Indeed, apparently sensitive in this once instance to its Brady obligations, the Government notified the defense that it would not call Sedgwick. When the defense interviewed him, Sedgwick "flatly contradicted Mr. Van Aken and said he was not a nominee but he considered himself to be the owner of the securities" (A 63).

Although there was no issue as to Sedgwick's availability, it turned out that neither side called him, and in summation, appellant De Boer's counsel strenuously argued that it was the Government which should have done so:

> "Mr. Van Aken also told you that he used a fellow named Donald Sedgwick as a nominee. That's an important fact. The Government as I said has pulled out a lot of stops in this

> case. They called in all sorts of insignificant witnesses to bolster this frail and skimpy case of theirs. Why didn't they call Sedgwick to corroborate Van Aken's story? Here's a guy who could corroborate him dead center. Surely if Sedgwick would have testified he was Van Aken's nominee in this deal, the government would have called him as a witness, and they didn't, and you may find that they didn't because he wouldn't" (Tr. 977).

The defense did not request a charge on Sedgwick's absence.* The Government, however, made a request which included the following language:

> "If the government has failed to call a witness who is equally available to both sides, you may not draw an inference that his or her testimony would have been unfavorable to the prosecution. There's no presumption against the government from its failure to call witnesses if it should appear to you that their testimony would be merely cumulative or repetitive and of no greater value than that of witnesses who have testified" (A 51).

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*The defense cannot be faulted for not requesting the charge which we contend should have been given once the Court undertook to say anything at all about Sedgwick's absence. Both the defense and the Government knew that Sedgwick denied being a nominee, and burdened with that knowledge, the Government could hardly have urged the jury to infer that Sedgwick would have supported Van Aken if called. Consequently, a charge permitting the jury to draw an inference either way was not, from the defense standpoint, preferable to a strong defense argument in summation followed by no charge at all.

Since Sedgwick was the only person to whom this language could have been intended to relate, and the Government knew full well that Sedgwick would deny that he was Van Aken's nominee if called, this request was simply disingenuous.

In the seventy-page colloquy with counsel about its proposed charge, the Court gave no hint that it would give any instruction to the point (Tr. 807-75). Nevertheless, the Court proceeded to charge on Sedgwick's absence substantially as the Government had requested:

> "Now, there is no duty on the part of the government to call in other or additional witnesses whose testimony would merely be cumulative. You are to decide this case on the evidence which is before you or upon the absence of evidence, but not upon evidence which might have been brought before you. Specifically, the government had no duty to call Donald Sedgwick as a witness. As I explained to you earlier, defendants have no duty to call any witnesses or bring any evidence. However, Donald Sedgwick is equally available to both sides, and could be subpoenaed by the government or by any defendant if either of them thought they should do so and, accordingly, no inference follows adverse to anyone from the failure to call him as a witness and no such inference adverse to any side in this litigation follows from a failure to bring in testimony which the jury would regard as merely cumulative" (A 52).

The law is crystal clear in this Circuit that unless

the evidence would be simply cumulative, the jury should be charged that it may draw an adverse inference against either party, for failure to call an equally available witness. United States v. Dixon, -- F.2d --- (2nd Cir., March 12th, 1976), sl. op. at pp. 2623-24; United States v. Llamas, 280 F.2d 392 (2nd Cir., 1960); United States v. Beekman, 155 F.2d 580, 584 (2nd Cir., 1946). Compare, United States v. Antonelli Fireworks Co., 155 F.2d 631, 638-39 (2nd Cir., 1946).

It is obvious that the testimony of Sedgwick would have been anything but cumulative in this case. Had Sedgwick appeared and said he was in fact Van Aken's nominee, Van Aken's story about plotting with appellants Erb and De Boer to hide their ownership so as to evade the NASD's excess compensation rules would have been incomparably stronger, since there was no other proof of Sedgwick's status, and Van Aken's own credibility was so low. Had Sedgwick, on the other hand, testified that he was the true owner of the shares in his name, his evidence would have been the precise opposite of "cumulative", and Van Aken's story would obviously have been dealt a critical blow.

In fact, the Court was advised immediately after its

instruction, with no disagreement by the Government, that Sedgwick would have "flatly contradicted" Van Aken if called (A 39). We respectfully submit that the Court committed reversible error when it then refused to correct a charge which was so obviously inapplicable to the facts, and which unfairly directed the jury to ignore a defense argument which was not only important and rational, but also, in the unsual circumstances of this case, unquestionably correct.*

CONCLUSION

Appellant Erb's conviction should be reversed.

Respectfully submitted,

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CHARLES D. ERB

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*Appellant Erb also adopts the challenges to the Trial Court's charge set forth in Point III of appellant De Boer's brief.